Supreme Court, U.S.
FILED
FEB 20 1996
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95-1147

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOE O. RAGAN,
Petitioner,

v.

CONTICOMMODITY SERVICES, INC. and
CONTINENTAL GRAIN COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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February 20, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

15 pp

QUESTIONS PRESENTED

1. Whether the court of appeals properly construed petitioner's claim, based on petitioner's own representations, as a state-law claim for conversion of the balance allegedly remaining in his trading account after all securities and commodity futures positions had been liquidated.

2. Whether the court of appeals properly applied to the facts of this case the principle recognized in *Galigher v. Jones*, 129 U.S. 193 (1889), that damages for conversion of securities or other instruments that vary in market value can be awarded based upon the value of those instruments within a "reasonable time" after their conversion.

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed in the caption, David J. Ragan was a party to the proceedings in the Fifth Circuit. David J. Ragan has filed a separate petition for certiorari with this Court, No. 95-1151.

Pursuant to S. Ct. R. 29.6, respondents state that Continental Grain Company has no parent company. Continental Grain Company has one non-wholly owned subsidiary, ContiFinancial Corporation, which is a consolidated subsidiary the stock of which is publicly traded. The parent company of ContiCommodity Services, Inc., is Continental Grain Company; ContiCommodity Services, Inc., has no non-wholly owned subsidiaries.

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BRIEF IN OPPOSITION

ContiCommodity Services, Inc. ("Conti") and Continental Grain Company ("Continental") respectfully submit this brief in opposition to the petition for a writ of certiorari filed by petitioner Joe O. Ragan.[1] Because no issue of federal law is properly presented by the petition and because the suggested conflict with this Court's decision in *Galigher v. Jones*, 129 U.S. 193 (1889), is completely spurious, the petition should be denied. In proceedings before two separate district courts, petitioner

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[1] David J. Ragan, the son of Joe Ragan and also a party below, has filed a separate petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fifth Circuit in this case; that petition has been assigned No. 95-1151.

explicitly waived any cause of action based upon federal law. Instead, he elected to pursue only a claim, based entirely upon state law, that Conti and Continental had converted a balance allegedly remaining in his Conti trading account after all securities and commodity futures positions had been liquidated. Moreover, and in any event, the Fifth Circuit's decision was entirely consistent both with state law and this Court's decision in *Galigher*. There is no question meriting the exercise of this Court's certiorari jurisdiction.

DECISIONS BELOW

In addition to the decision of the United States Court of Appeals for the Fifth Circuit referenced in the petition, the United States District Court for the Northern District of Illinois issued a reported decision on certain summary judgment motions, including a summary judgment motion directed at claims asserted by petitioner, during the multidistrict phase of this litigation. *In re Conti-Commodity Services, Inc., Securities Litig.*, 733 F. Supp 1555 (N.D. Ill. 1990), *rev'd in part, Brown v. United States*, 976 F.2d 1104 (7th Cir. 1992). That decision is reproduced in the appendix to this opposition brief, Opp. App. 1a-49a.[2] Following the multidistrict phase of this litigation, this case was transferred to the United States District Court for the Southern District of Texas for further proceedings. That court entered judgment in favor of Conti and Continental on Joe Ragan's remaining claims, pursuant to Fed. R. Civ. P. 54(b), on April 14, 1994. Opp. App. 56a-57a. That judgment incorporated orders entered by the United States District Court for the Southern District of Texas on July 16, 1993 (Opp. App. 50a-51a) and March 25, 1994 (Opp. App. 52a-55a).

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[2] The Seventh Circuit's decision concerned only certain suits for tax refunds, not the case at issue in the petition, and is therefore not reproduced.

COUNTERSTATEMENT OF THE CASE

Petitioner Joe Ragan's statement of the case recites numerous facts not considered relevant by any of the three lower courts that addressed his claims and is inaccurate in many respects. Nevertheless, for present purposes, only three corrections need be made. First, this particular litigation began when Conti and Continental sued David J. Ragan, petitioner's son and the former chief trader at Conti's Conti-Arbitrage Houston ("CAH") office, for illegal manipulation of customer accounts, including fraudulent trading and the funneling of millions of dollars from Conti through petitioner's account and otherwise to David Ragan. Second, Conti closed its CAH office and its customers' accounts after it and its customers suffered multi-million dollar losses as a consequence of David Ragan's trading at CAH, and Conti was completely within its rights in so doing. Third, petitioner expressly represented to the first district court to consider his claim—as both of the district courts and the court of appeals expressly found—that he did not claim that any particular trade that Conti (or his son David Ragan) made was wrongful, including the trades that liquidated the positions in his CAH account. Rather, petitioner asserted only that Conti and Continental had wrongfully converted a positive money balance in his account—*i.e.*, after his positions had been liquidated, there was money in the account to which he was entitled and which he was not paid. Seen against this backdrop, petitioner's attempt to create an important federal question warranting the exercise of this Court's certiorari jurisdiction is not only meritless, but utterly contrived.

1. This particular piece of the complex litigation that arose from the closing of CAH began when "Conti filed suit against David Ragan, alleging fraudulent and fictitious transactions." App. 5A; *see also* Opp. App. 3a ("Conti . . . claims that the customer parties conspired with David

Ragan to have profitable trades allocated to them and that this resulted in Conti having to reimburse customers who received the loss side of the trades."). Conti alleged that petitioner was one such customer who received fraudulently allocated trades, resulting in the improper transfer of millions of dollars from Conti to both petitioner and David Ragan.[3]

2. Conti closed its CAH office after, as the court of appeals noted, "Conti's Houston branch office had incurred more than $55 million in trading losses for the accounts of its arbitrage and speculative customers." App. 4A; *see also* Pet., p. 5 n.3 (conceding that Conti had paid securities dealers for trading losses of $55 million). In his sole remaining claim, petitioner does not allege—and no court has ever found—that Conti acted other than within its rights in closing his account and the accounts of the other customers of CAH.

Petitioner attempts to suggest, however, that Conti and Continental acted improperly by repeatedly asserting in his petition that his securities and commodity futures positions were guaranteed to yield a profit. *See, e.g.*, Pet. p. 3 ("government securities provide[] a locked-in final value"); *id.*, p. 4 ("the nature of the trade effectively assured Conti of repayment of its loans"). But these calculations do not account for the use of repurchase agreements to finance the trading positions, which create financing costs for the customers, nor do they consider the real costs Conti incurred as a result of the money-losing customer trades. Moreover, because of his concessions

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[3] Conti's claims against both Ragans are still pending in the Southern District of Texas, and Conti does not intend to dismiss those claims until the conclusion of a malicious prosecution suit which David Ragan instituted, after oral argument in the Fifth Circuit, in Illinois state court against Conti, Continental, and their attorneys and accountants. *Compare* Pet., p. 10 n.6.

below, the success or failure of petitioner's trading strategy is ultimately irrelevant to his claim for damages.[4]

3. As this case reaches this Court, petitioner's claims against Conti and Continental are not based upon any alleged impropriety in trading, including the trading through which petitioner's securities and futures contracts were liquidated. In fact, petitioner explicitly disclaimed any such allegations in order to avoid District Judge Hart's ruling during the multidistrict phase of the litigation that a plaintiff's failure to specify the trades considered "bad" or improper barred such claims. *See* Opp. App. 5a-7a. As the Fifth Circuit recognized, "Joe Ragan did not challenge the summary judgment entered by Judge Hart [and] provided no indication that particular trades were challenged." App. 14A & n.10.

Instead, as the district courts repeatedly stated, Joe Ragan "claim[ed] Conti converted the balances in [his] account[], not that Conti improperly closed out [his] positions." Opp. App. 18a; *see also id.* 6a ("[t]he claims of . . . Joe Ragan are not based on allegations of bad trades"); *id.* 3a ("Joe Ragan claim[s] that Conti did not distribute the entire balance[] remaining in [his] account when CAH was closed down"). As District Judge Black noted following the multidistrict phase of the litigation, Judge Hart made these findings because he had "been advised at a hearing by Joe Ragan's counsel that Joe Ragan's claim was that he was 'owed money because we got an account statement in March and April that showed that we had a positive balance.' " Opp. App. 53a. Petitioner's claims, therefore, were based entirely on

[4] Petitioner suggests, with the benefit of hindsight (Pet., p. 7), that his positions might have yielded a net profit if they had not been liquidated. But petitioner waived any claim that his positions were improperly liquidated and, in any event, at the time the accounts were closed, Conti could not foresee the change in interest rates that later occurred.

the state law of conversion, and do not rest in any way on federal securities or commodity futures laws.

REASONS FOR DENYING THE PETITION

The petition presents no issue of federal law. It presents no conflict among the United States Courts of Appeals nor any conflict between decisions of the federal and state courts. It presents no conflict with this Court's pre-*Erie* decision in *Galigher v. Jones,* 129 U.S. 193 (1889). In short, the petition raises no issue warranting the exercise of this Court's certiorari jurisdiction.

As litigated in the courts below, petitioner's claim against Conti and Continental was solely a claim for conversion of the money balance alleged to exist in his trading account. This is a state-law claim, and the measure of damages, if any, that petitioner could recover is an issue for the States. Moreover, the Fifth Circuit applied settled law to this case. It held that the undisputed facts established that petitioner had a negative balance in his account at the time of the alleged conversion (meaning that he could not have any damages) and, alternatively, that even if permitted to measure damages at a "reasonable" time following the alleged conversion, the balance in petitioner's account would have remained negative. These holdings are entirely consistent with *Galigher* and do not contradict any decision of any other court.

1. Attempting to create an issue for this Court to review, petitioner claims that the decision of the court of appeals is in "tension" (Pet., p. 11) with this Court's decision in *Galigher v. Jones,* 129 U.S. 193 (1889). But, in fact, *Galigher* does not apply to the claim petitioner pursued in this case. Moreover, even if *Galigher* does apply, the Fifth Circuit's reasoning is entirely consistent with *Galigher* and fits precisely within the body of law developed by other courts of appeals following *Galigher.*

Galigher was decided before *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), in which this Court terminated the

federal courts' authority over substantive principles of state law in diversity cases. In *Galigher*, a customer had alleged that his stock broker had made certain unauthorized transactions in the customer's account. Selecting what it considered to be the "best" law, this Court held that "the measure of damages in stock transactions of this kind is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter." *Id.* at 200. The court found that this rule was necessary to award adequate damages because stocks, unlike "[o]ther goods wrongfully converted," do not "have a fixed market value at which they can be replaced at any time." *Id.*

Following *Galigher*, federal courts have applied this "highest intermediate value" test in a variety of situations involving securities or futures contracts. But, in each of these cases, the plaintiff alleged that the defendant had made illegal or inappropriate trades, and the property therefore allegedly converted was the securities or futures contracts that had been traded. *See Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 972-73 (2d Cir. 1987) (plaintiff alleged that broker wrongfully sold his futures positions); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990) (discussing *Galigher* in suit based on improper liquidation of customer's securities); *Schultz v. CFTC*, 716 F.2d 136, 140-41 (2d Cir. 1983) (wrongful liquidation of futures contracts; and collecting older cases); *Agra, Gill & Duffus, Inc. v. Benson*, 920 F.2d 1173, 1179 (4th Cir. 1990) (*Galigher* applies where broker fails to follow customer's trading instructions); *Myzel v. Fields*, 386 F.2d 718, 746 (8th Cir. 1967) (*Galigher* applies to wrongful conversion of stock), *cert. denied*, 390 U.S. 951 (1968); *Letson v. Dean Witter Reynolds, Inc.*, 532 F. Supp. 500, 502-03 (N.D. Cal. 1982) (wrongful liquidation of futures positions), *aff'd mem.*, 730 F.2d 769 (9th Cir. 1984); *Modern Settings, Inc. v. Prudential-Bache Securities, Inc.*, 747 F. Supp. 194, 195-96 (S.D.N.Y. 1990) (unauthorized trading in

customer accounts), *aff'd in part, rev'd in part,* 936 F.2d 640 (2d Cir. 1991).

2. By contrast with *Galigher* and its progeny, petitioner did not assert that the securities and futures contracts in his account were wrongfully converted, but rather that Conti and Continental had converted the money balance of his account (after the securities and futures contracts had been liquidated) by refusing to pay to him the remaining (allegedly positive) balance. Thus, petitioner did not have any claim to which the *Galigher* rule applies: he claimed the conversion of a sum of money—which has a "fixed market value"—and not conversion of an instrument with a variable value necessitating use of the highest intermediate value rule.

As the Fifth Circuit recognized, "Joe Ragan's conversion claim was that Conti converted the balances in his account and not that Conti improperly closed out [his] positions." App. 14A (citing 733 F. Supp. at 1569-70 (Opp. App. 17a-18a)). Nevertheless, petitioner argues to this Court, as he argued to the court of appeals, that his claim is one made as "a forced or defrauded seller of securities." Pet., pp. 10-11. The Fifth Circuit properly rejected this contention, as had Judge Black, outright: "A review of [Joe] Ragan's counter-claim and the arguments in support thereof which were made before Judge Hart show that Judge Hart's 'conversion' characterization was accurate." App. 15A. This Court should not permit petitioner to succeed on a gambit that properly failed below. "Joe Ragan cannot avoid summary judgment by changing, at this point in the litigation, the character of his claims." Opp. App. 54a. What Judge Black wrote below is equally applicable here: "[T]he arguments he seeks to raise are those which he, in a prior attempt to avoid summary judgment, advised Judge Hart were not applicable to his claims." *Id.*

Seen in this light, petitioner's claim is purely a state-law claim for conversion of the balance of the account

and raises no issue under the federal securities or commodity futures laws. "[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); *accord Butner v. United States*, 440 U.S. 48, 57-58 (1979); *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983).

In all events, the Fifth Circuit's decision comports with state law. Texas law—which governs Joe Ragan's state-law claim (*see* App. 6A)—is clear that the measure of damages in a conversion action is the value of the allegedly converted property at the time of its conversion. *E.g., Imperial Sugar Co. v. Torrans*, 604 S.W.2d 73, 74 (Tex. 1980) (As a general rule "the measure of damages in cases of conversion is the value of the property converted at the time of such conversion") (internal quotation omitted). The district court and the Fifth Circuit found (App. 15A & n.11; Opp. App. 53a; Opp. App. 50a), and petitioner does not dispute here, that his account had a negative balance at the time that it was closed.

3. Contrary to petitioner's suggestion, the Fifth Circuit's decision is also entirely consistent with *Galigher*, and its progeny, should that decision apply. Rather than "rejecting" *Galigher* (Pet., p. 16), the Fifth Circuit's decision, as an alternative holding, assumes the applicability of that measure of damages, but nevertheless holds that petitioner's securities and commodity futures positions would not have yielded a profit within the reasonable time (if ever) that the *Galigher* rule requires. *See Galigher*, 129 U.S. at 200.

The Fifth Circuit noted petitioner's argument, purportedly based on *Galigher*, that his damages should have been based on "the value that the securities would have at maturity, rather than the market value of the securities at or near the time they were sold by Conti." App. 15A.

Nevertheless, as the Fifth Circuit also noted, there is no "statutory or jurisprudential" authority for the proposition that "the value of [Joe] Ragan's account is the face value of the securities in the account." App. 16A. Moreover, directly referring to the damages formulation that had its origin in *Galigher*, the Fifth Circuit rejected petitioner's contention and held that petitioner's account would not have had a positive value within any reasonable time. "Ragan presented some evidence that his position in these securities finally, would have become 'positive' some four months after the allegedly improper acts of Conti. However, he cites and we have found no statutory or jurisprudential basis for a finding that, as a matter of law, four months is a 'reasonable' time to form the basis for calculating his requested 'but for Conti's liquidation' damages in the type of trading that was done in his account.'" App. 15A n.11.

The Fifth Circuit's holding that four months is not a reasonable time is in complete accord with decisions following *Galigher*. Indeed, in *Katara*, the Second Circuit cited a series of decisions holding that one week or less was the maximum reasonable time within which to reenter the market or to demand reinstatement. *See Katara*, 835 F.2d at 973. Although the Second Circuit declined to adopt a "hard and fast rule," it held that a "reasonable" time could be no greater than five weeks under any circumstances. *See id.* at 969; *see also Chipser v. Kohlmeyer & Co.*, 600 F.2d 1061, 1068 (5th Cir. 1979) (twenty-six days is too long); *Mitchell v. Texas Gulf Sulphur Co.*, 446 F.2d 90, 105 (10th Cir. 1971) (9 to 17 trading days reasonable), *cert. denied*, 405 U.S. 918 (1972); *Letson*, 532 F. Supp. at 507 (4 days was reasonable time); *Cauble v. Mabon Nugent & Co.*, 594 F. Supp. 985, 996 (S.D.N.Y. 1984) (2 days); *Courtland v. Walston & Co., Inc.*, 340 F. Supp. 1076, 1093 (S.D.N.Y. 1972) (one month).

Petitioner's heavy reliance (*see* Pet., pp. 17-19) on *Modern Settings, Inc. v. Prudential-Bache Securities, Inc.*,

747 F. Supp. 194 (S.D.N.Y. 1990), to argue that the Fifth Circuit's decision somehow contravenes *Galigher* is completely misplaced. As an initial matter, the district court's wrongful liquidation judgment in *Modern Settings* was reversed on the merits on appeal. *Modern Settings, Inc. v. Prudential-Bache Securities, Inc.*, 936 F.2d 640 (2d Cir. 1991). Moreover, the district court had held that three to five days was a reasonable period within which to measure damages on the wrongful liquidation claims, despite the fact that the plaintiff there claimed, as petitioner does here, that the brokerage firm seized his account and thus made it impossible for him to reinvest. *Modern Settings*, 747 F. Supp. at 196.

Similarly, petitioner's related suggestion that the Fifth Circuit's decision failed to take into account his "inability to reinvest" (Pet., pp. 17-19) is without basis. The Fifth Circuit did not hold that petitioner was obligated to reinvest as a condition to recovering on his conversion claim. Rather, the court merely addressed and rejected petitioner's assertion that "Conti prevented him from reentering the market." App. 15A. In particular, the Fifth Circuit expressly noted that petitioner did not "point to any summary judgment evidence that he demanded either reinstatement of his positions or some other action to remedy the situation." *Id.* In the face of petitioner's assertion that Conti's misconduct prevented him from reentering the market as he wished to do, the court of appeals correctly observed that "[a] failure either to reinvest or demand reinstatement of one's trading position amounts to a decision to get out of the market and not risk a further loss." App. 15A-16A (citing *Chipser v. Kohlmeyer & Co.*, 600 F.2d at 1067-68).[5]

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[5] Petitioner attempts to dispute this point by contending that his son, the trader David Ragan, had objected to closing all of the customer accounts. Pet., p. 15 n.7. But petitioner cites no authority, and there is none, that such an objection suffices. Moreover, it was petitioner's burden to establish his damages, and it was

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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therefore his burden to present (before this late date) any evidence and argument that he demanded reinstatement of his securities and commodity futures positions.